IN THE SUPREME COURT OF FLORIDA

EVERETT WARD MILKS,

Petitioner,

vs. **Case No. SC03-1321**
L.T. No. 2D02-460

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW
FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

NOTICE OF RELATED CASES

Throughout his initial brief on the merits, the petitioner, Everett Ward Milks, relies extensively on the decision of the Third District Court in *Espindola v. State*, 855 So. 2d 1281 (Fla. 3d DCA 2003), declaring unconstitutional Florida's Sexual Predators Act, §775.21, Florida Statutes. (*See*, Brief of Petitioner on the Merits at 6, 7, 11, 14, 17, 22, 25, 30, 31). Review of the Third District Court's decision in *Espindola* is currently pending before this Court in *State v. Espindola*, SC03-2103. Therefore, the instant brief relies on, and reiterates, the State's arguments previously presented to this Court in *Espindola*, SC03-2103.

Additionally, in *Therrien v. State*, 859 So. 2d 585 (Fla. 1st DCA 2003), the First District Court certified the following as a question of great public importance:

> Whether the retroactive application of the permanent employment restrictions of section 775.21(10)(b), Florida Statutes (2000), to a defendant convicted and qualified as a sexual predator, without a separate hearing on whether such defendant constitutes a danger or threat to public safety, violates procedural due process.

Therrien, 859 So. 2d at 588

On December 18, 2003, Therrien filed a Notice to Invoke the Discretionary Jurisdiction of this Court on the basis of this

certified question. *See, Therrien v. State*, SC03-2219.

STATEMENT OF THE CASE AND FACTS

Petitioner has invoked the discretionary jurisdiction of this Court to review *Milks v. State*, 848 So. 2d 1167 (Fla. 2d DCA 2003) in which the Second District Court affirmed the trial court's order that designated petitioner a sexual predator under the Florida Sexual Predators Act, §775.21, Fla. Stat. (2000) (the "Act"). The United States Supreme Court in *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003), recently upheld a nearly identical statute, and the Second District Court relied, in part, on *Doe* in upholding the Florida statute against the petitioner's constitutional challenge. *Milks*, 848 So. 2d at 1169.

The Sexual Predators Act.

Florida's Sexual Predators Act was adopted in recognition of the real and substantial threat to public safety posed by persons convicted of serious and/or multiple sexual offenses. The Legislature determined repeat sexual offenders, violent sexual offenders, and sexual offenders who prey on children pose an extreme threat to public safety. Section 775.21(3)(a), Fla. Stat. The Act requires individuals designated as convicted sexual predators, a designation based solely on one or more requisite criminal convictions for qualifying offenses, to register their identities and addresses with law enforcement

authorities. All 50 states and the federal government have some form of sexual predator/registration and public disclosure law. Approximately half of those laws, like Florida's (and the law at issue in *Doe*), require registration and public disclosure based solely on the nature of the offense for which the offender has been convicted, not on any current factual finding as to dangerousness. The Act provides Florida's citizens with ready access to already public information regarding convicted sexual offenders. This information allows Floridians to educate themselves about the possible presence of convicted sexual offenders in their local communities.

Convicted offenders must register with the Florida Department of Law Enforcement ("FDLE") or the sheriff's office, and with the Department of Highway Safety and Motor Vehicles. Section 775.21(6), Fla. Stat. Registration includes name, social security number and physical, identifying information, including a photograph. *Id.* The convicted sex offender, when registering, must describe the offenses for which he or she has been convicted. *Id.* Upon a change of residence, the convicted offender must report the change, in person, to the Department of Highway Safety and Motor Vehicles within 48 hours. Section 775.21(6)(g), Fla. Stat.

Law enforcement then facilitates public access to the

registration information and conviction history of each offender. FDLE makes the registration information available to the public, including the name of the convicted sexual predator, a photograph, the current address, the circumstances of the offenses, and whether the victim was a minor or an adult. Section 775.21(7), Fla. Stat. FDLE also maintains hotline access to the registration information for the benefit of state, local, and federal law enforcement agencies in need of prompt information. Section 775.21(6)(k), Fla. Stat. The registration list is designated a public record. *Id.* FDLE must make the registration information available to the public through the Internet. Section 775.21(7)(c), Fla. Stat. FDLE's website includes the "Sexual Predator/Offender Database." (www3.fdle.state.fl.us/sexual_predators/). The website enables users to search for information about registered sexual predators or registered sexual offenders[1] by name, county, city

[1] Florida's Sexual Offender Registration Act (SORA), § 943.0435, Fla. Stat., results in similar public notification as under the Sexual Predators Act. The main differences between the two acts are that a single conviction for a serious offense, or two convictions for lesser offenses, will result in registration under the Sexual Predators Act, whereas a single conviction for any of the enumerated sexual offenses will result in registration under SORA. Additionally, the employment restrictions imposed upon those who must register under the Sexual Predators Act do not exist under SORA. FDLE's website contains a joint database for those registered under the two acts, and, when a registered individual's information page is accessed, information is included so that it can be determined whether the individual has registered under the Sexual Predators

or zip code. The website includes cautionary admonitions to the public, explaining that the database classifications are based solely upon qualifying convictions and that "placement of information about an offender in this database is not intended to indicate that any judgment has been made about the level of risk a particular offender may present to others."

Failure to comply with the Act constitutes a third-degree felony. Section 775.21(10)(a), Fla. Stat. Also, it is a third-degree felony for most individuals designated as sexual predators to work at schools, day care centers and other places where children regularly congregate. Section 775.21(10)(b), Florida Statutes. The Act further provides immunity "from civil liability for damages for good faith compliance with the requirements of this section or for the release of information under this section. . ." Section 775.21(9), Fla. Stat.

Case Background and Procedural History.

On July 30, 2001, the Petitioner, Everett Milks, entered a no contest plea to a charge of lewd and lascivious molestation, a first-degree felony under §800.04(5)(b), Florida Statutes, and he was sentenced to 6½ years incarceration. (R38-42). On December 12, 2001, the State filed a "Notice of Intent to Have the Defendant Declared a Sexual Predator," pursuant to

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Act or SORA.

§775.21(4), Florida Statutes. (R45).

Milks filed and argued a motion to dismiss the State's notice of sexual predator designation on two grounds. (R46-47; 48-63; 73-77). First, Milks contended that the statute allegedly violated the "separation of powers" clause of Article II, section 3 of the Florida Constitution. (R73-74) Second, Milks argued that the Act allegedly violated procedural due process because the defendant is not entitled to a [post-conviction] hearing -- "there is no procedure [sic] method for a defendant to establish that he is currently a threat to public safety or he is likely to use force in the future to repeat his offense." (R76; 46). The trial court overruled Milks' objections, specifically noting that he was "not being called upon to pass upon the substantive nature" of the Sexual Predator Act and held the Act constitutional. (R81; 82) On January 2, 2002, Milks was designated a sexually violent predator. (R84); *Milks*, 848 So. 2d at 1168. The Second District affirmed the order designating Milks as a sexual predator, explaining that

> We must reject Mr. Milks' argument that the Act violates constitutional principles of separation of powers. See Kelly v. State, 795 So. 2d 135 (Fla. 5th DCA 2001); cf. State v. Cotton, 769 So. 2d 345 (Fla. 2000) (holding Prison Releasee Reoffender Punishment Act, which took all sentencing discretion away from trial court and placed it in hands of prosecutor, did not violate separation of powers). With respect to Mr. Milks' procedural due process claim, we also affirm in light of the United States Supreme Court's

decision in Connecticut Department of Public Safety v. Doe, 155 L. Ed. 2d 98, 123 S. Ct. 1160 (Mar. 5, 2003).

Before the circuit and appellate courts, Mr. Milks has argued that the Act violates procedural due process because it publicly labels him as a dangerous sexual predator without providing him a hearing as to his actual dangerousness. Mr. Milks has relied primarily on Doe v. Department of Public Safety, 271 F.3d 38 (2d Cir. 2001). In Doe, the Second Circuit held that a similar Connecticut act violated procedural due process because it deprived the defendant of a liberty or property interest by imposing a stigma upon him without providing a hearing to determine whether the defendant was dangerous. Doe, 271 F.3d 38 (citing Paul v. Davis, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1975)).

After the parties filed their briefs in this case, the United States Supreme Court reversed Doe in Connecticut Department of Public Safety v. Doe, 155 L. Ed. 2d 98, 123 S. Ct. 1160 (Mar. 5, 2003). The Supreme Court held that even if a liberty or property interest was implicated in the Connecticut act, due process did not entitle the defendant to a hearing to establish whether he or she was dangerous, as that fact was not material under the statute. Id. at 1164.

The reporting requirements of Florida's act, like Connecticut's, are determined solely by a defendant's conviction for a specified crime. See § 775.21. The conviction itself is "a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." Doe, 123 S. Ct. at 1164. Florida, like Connecticut, has decided that the public must have access to information about all convicted sex offenders, currently dangerous or not, and that those convicted sex offenders must face certain sanctions. Thus, procedural due process does not require a hearing to prove a fact irrelevant to the statutory scheme. Id.

The Supreme Court has not determined whether the Connecticut act or ones similar to it violate substantive due process. Id. at 1164-65. However, Mr. Milks, like Mr. Doe, has not raised that claim. Id. We therefore affirm the order designating Mr. Milks a

sexual predator.

Milks, 848 So. 2d at 1169.

Petitioner filed a notice to invoke discretionary jurisdiction. This Court has accepted jurisdiction and dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. *Milks v. State*, 848 So. 2d 1167 (Fla. 2d DCA), *rev. granted*, 859 So. 2d 514 (Fla. 2003).

SUMMARY OF ARGUMENT

In *Milks*, the Second District Court held that the Florida Sexual Predators Act does not violate the principles of procedural due process absent an evidentiary hearing on the question of the individual's current dangerousness. In *Doe*, the United States Supreme Court held, in the context of a virtually identical act, that where the registration and public notification provisions of the act flow automatically from the fact of a prior conviction, procedural due process does not entitle the convicted person to such an evidentiary hearing. All of Florida's District Courts of Appeal, other than the Third District Court in *Espindola*, have recognized and followed this holding.

Additionally, even if *Doe* were distinguishable, there would still be no requirement for an evidentiary hearing to render the act constitutional. Procedural due process rights exist only if there is a viable property or liberty interest at stake. Harm to one's "reputation" qualifies as such an interest only if the "stigma-plus" test of *Paul v. Davis*, is satisfied. A "stigma" does not exist when the information is both truthful and otherwise public. Any consequences flow from the fact of conviction, not from registration and publication. Additionally, the factors identified by the *Espindola* court--

registration, deprivation of tort remedies, and restrictions on employment in settings with children--do not qualify as plus factors.

Petitioner's unpreserved constitutional challenges (substantive due process and equal protection) are both procedurally barred and meritless. The statute does not violate the petitioner's newly-alleged privacy interests and the Act is narrowly drawn to accomplish its purpose -- protecting the public by ensuring that sexual offender information is available to the public. Lastly, the designation of a defendant as a sexual predator is neither a sentence nor a punishment, but "simply a status resulting from the conviction of certain crimes." §775.21(3)(d), Fla. Stat. Section 775.21 does not violate the doctrine of separation of powers.

ARGUMENT

I. THE FLORIDA SEXUAL PREDATORS ACT DOES NOT VIOLATE PROCEDURAL DUE PROCESS.

Florida's Sexual Predators Act requires simply that individuals designated as sexual predators, based on one or more requisite criminal convictions for qualifying offenses, register their identities and addresses with law enforcement authorities. The Act applies to individuals convicted of serious and/or multiple sexual offenses. Individuals convicted of enumerated capital, life, or first degree felonies, or attempts thereof, are designated automatically as sexual predators. Section 775.21(4)(a)(1)a, Fla. Stat. Individuals convicted of any other enumerated felonies are designated as sexual predators only if "the offender has previously been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication, any violation of the enumerated sexual offenses." Section 775.21(4)(a)1.b, Fla. Stat. Therefore, registration and public disclosure are based solely on the nature of the offense for which the offender has been convicted, not on any current factual finding as to dangerousness.

Connecticut Dep't of Public Safety v. Doe, 538 U.S. 1 (2003) controls this case. *Doe* holds that the absence of a judicial hearing does not violate principles of procedural due process when the facts sought to be proved or disproved at the hearing

are irrelevant to the judicial determination.

Even if *Doe* did not apply to Florida's Act, no procedural due process violation exists because the Act does not implicate any protected liberty interest. There is no "stigma" from the publication of truthful factual information consisting of an individual's convictions for sexual offenses. The offender's reputation flows directly from the offender's own criminal conduct.

A. *Doe* Compels Affirmance.

The United States Supreme Court recently rejected a procedural due process challenge to Connecticut's sex offender registration act in *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003). As in Florida, under Connecticut's Act, individuals convicted of enumerated sex offenses are obligated to register with law enforcement, and their names, residences and convictions are posted on an Internet website maintained by the State. The Connecticut Act operates in the same manner as Florida's - the duty to register and the availability of the information on the Internet flow automatically from the conviction for the enumerated offense. Neither statute provides for any judicial determination of the individual's current or future dangerousness to the public. As in this case, the

procedural due process challenge in *Doe* was based on the failure of the act to provide for a judicial determination of current dangerousness, with an opportunity for the individual to contest that fact. *See, Milks v. State*, 848 So. 2d 1167, 1169 (Fla. 2d DCA 2003).

The Supreme Court rejected the procedural due process challenge because the determination of dangerousness was irrelevant under the Connecticut Act. As a matter of procedural due process, the Court held there is no entitlement to a hearing for the purpose of determining a fact that is irrelevant to the statutory scheme:

> In cases such as *Wisconsin v. Constantineau* . . . and *Goss v. Lopez* . . . we held that due process required the government to accord the plaintiff a hearing to prove or disprove a particular fact or set of facts. But in each of these cases, the fact in question was concededly relevant to the inquiry at hand. Here, however, the fact that respondent seeks to prove - that he is not currently dangerous - is of no consequence under Connecticut's Megan's Law. . . . [Therefore, E]ven if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders--currently dangerous or not--must be publicly disclosed.

Doe, 538 U.S. at 7 (citations omitted). The Court noted that the disclaimer on the website explicitly states that an offender's alleged nondangerousness simply does not matter. *Id.*

Florida's Act operates in the same manner as Connecticut's. Moreover, the FDLE website carries the same disclaimer as in Connecticut. Therefore, *Doe* compels the conclusion that Florida's Act does not violate procedural due process.

The Third District Court, in *Espindola v. State*, 855 So. 2d 1281 (Fla. 3d DCA 2003), stands alone in finding Florida's Sexual Predators Act unconstitutional as violating procedural due process. The First, Second, and Fourth Districts have held that Florida's Act does not violate procedural due process requirements. *See Milks*, 848 So. 2d at 1169 (reporting requirements of Florida's Act, like Connecticut's, are determined solely by defendant's conviction for specific crime, and Florida, like Connecticut, may decide to give public access to information about all convicted sex offenders, currently dangerous or not, without a hearing); *Reyes v. State*, 854 So. 2d 816, 817 (Fla. 4th DCA 2003) ("We can discern no reason not to apply the [*Doe*] reasoning here."); *Therrien v. State*, 859 So. 2d 585 (Fla. 1st DCA 2003) ("Appellant's conviction is the only material fact necessary for the imposition of the requirements of section 775.21."). Most recently, the Fifth District Court, in *Miller v. State*, 861 So. 2d 1283 (Fla. 5th DCA 2004), cited *Milks* and *Reyes*, affirmed the trial court's order declaring the

defendant a sexual predator, and certified conflict with *Espindola*.

Additionally, three district courts of appeal have rejected the same procedural due process challenge to a similar act, §943.0435, Florida Statutes, the Sex Offender Registration Act, which operates in the same manner as the Sexual Predators Act, but with different qualifying convictions. *DeJesus v. State*, 2003 Fla. App. LEXIS 18728, 28 Fla. L. Weekly D2845 (Fla. 4th DCA Dec. 10, 2003); *Givens v. State*, 851 So. 2d 813 (Fla. 2d DCA 2003); *Johnson v. State*, 795 So. 2d 82 (Fla. 5th DCA 2000).

Furthermore, courts from many other jurisdictions have relied on *Doe* to find that procedural due process does not require judicial hearings on dangerousness when the applicable statutes predicate sex offender registration and community notification solely on a qualifying conviction, and not on dangerousness.[2]

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[2] *See, e.g.*, *Chalmers v. Gavin*, 2003 U.S. Dist. LEXIS 20461 (N.D. Tex. Nov. 13, 2003) (Texas); *Ex Parte Robinson*, 116 S.W.3d 794 (Tex. Crim. App. 2003) (same); *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003) (Minnesota), *cert. denied*, 2004 U.S. LEXIS 364 (2004) ; *John Does v. Williams*, 2003 U.S. App. LEXIS 12570 (D.C. Cir. June 19, 2003) (District of Columbia); *Herreid v. Alaska*, 69 P.3d 507 (Ala. 2003) (Alaska); *Illinois v. D.R.* (*In re D.R.)*, 794 N.E. 2d 888 (Ill. App. 2003) (Illinois); *Illinois v. J.R.* (*In re J.R.*), 793 N.E. 2d 687 (Ill. App. 2003) (same); *Haislop v. Edgell*, 2003 W. Va. LEXIS 167 (W. Va. Dec. 5, 2003)

In *Espindola*, the Third District attempted to circumvent the principles of *Doe* based on legislative findings set forth in the Act. The Third District found the State's reliance on *Doe* "misplaced" because Florida's Act "*specifically* provides that sexual predators "present an extreme threat to the public safety. § 775.21(3)(1), Fla. Stat." *Espindola*, 855 So. 2d at 1290.

The Florida Legislature did set forth its findings in the Act, and those findings serve as the rationale for the automatic designation of predators under the Act. The Legislature, in a subsection entitled "Legislative Findings and Purpose; Legislative Intent," found that "[r]epeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety." Section 775.21(3)(a), Fla. Stat. While Connecticut's Act does not contain similar express legislative findings, it is nevertheless reasonable to infer that the Connecticut legislature passed its version of the registration and community notification law based on a belief that offenders convicted of enumerated sexual offenses pose a danger to the public. The legislative purpose motivating the

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(West Virginia).

acts in the two jurisdictions appears to be similar; the only difference is that Florida's legislative intent is express and Connecticut's is implied. Importantly, both acts make their requirements applicable regardless of whether the particular individual is found to be dangerous; it is sufficient in both cases that the individual is a member of a class of offenders that is perceived as presenting a danger. Thus, although the Third District, in *Espindola*, noted a "distinction" between the Connecticut and Florida acts, it is a distinction without any legal significance.

At least two other state registration and notification acts have similar legislative intent language, and those states' acts have been held to be immune from a procedural due process challenge. *See Herreid v. Alaska*, 69 P. 3d 507 (Ala. 2003); *Haislop v. Edgell*, 2003 W. Va. LEXIS 167, at *8 (W. Va. Dec. 5, 2003). Both the Alaska and West Virginia acts were prefaced by legislative findings comparable to those in the Florida Act. *See* Ch. 41, § 1, Alaska Session Laws (1994) ("sex offenders pose a high risk of reoffending after release from custody"); W. Va. Code § 15-12-1a (2000) (legislative purpose was to protect public from individuals convicted of sexual offenses). If a legislative finding could generate an entitlement to a hearing on due process grounds, this result would likely cause

legislators to keep their "findings" silent. Judicial analysis which motivates legislators to conceal their findings in order to minimize the likelihood of successful legal challenges to legislation would ultimately deprive the public of an understanding of the legislative process and thus undermine the democratic process.

B. The Act Does Not Implicate a Constitutionally Protected Interest.

Even if this Court concludes that *Doe* is not dispositive, the Act still does not violate principles of procedural due process because there is no protected liberty interest at stake. Procedural due process safeguards are constitutionally required only when state action implicates a constitutionally protected interest in life, liberty or property. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

The Supreme Court addressed the question of whether a person's interest in one's reputation qualifies as a constitutionally protected liberty interest in *Paul v. Davis*, 424 U.S. 693 (1976). In *Paul*, the Louisville Police Department distributed flyers identifying individuals who had been arrested for shoplifting as being active shoplifters. The flyers were accompanied by photographs of the individuals. Davis, who had been included on one such flyer even though the shoplifting charge against him was dismissed, filed a complaint setting

forth a procedural due process claim, asserting that the "active shoplifter" designation would inhibit him from entering business establishments and impair his future employment opportunities. 424 U.S. at 697.

The Court rejected the proposition that "reputation alone, apart from some more tangible interest such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 701. Ultimately, the Court held that "any harm or injury to [a reputation] interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law . . . ." 424 U.S. at 712. A defamatory statement by a state official was therefore not actionable under the due process clause absent some other harm caused by the statement. The requirement of additional harm represents a "plus factor," and it must be caused by the defamatory statement. This "stigma-plus" test has been construed and applied by hundreds of state and federal appellate court opinions.

The *Paul* opinion distinguished its earlier decision in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), where the "posting" of information pursuant to state statute regarding excessive drinking by named individuals led to the inability of

those individuals to obtain alcoholic beverages. In discussing *Constantineau*, the *Paul* Court acknowledged the "drastic effect of the 'stigma' which may result from defamation by the government. . ." 424 U.S. at 701. However, the *Paul* Court did "not think that such defamation, standing alone, deprived Constantineau of any 'liberty' protected by the procedural guarantees of the Fourteenth Amendment." 424 U.S. at 709. Rather, in *Constantineau* it was the deprivation of a right previously held under state law–-the right to purchase alcoholic beverages–-"which, combined with the injury ***resulting from the defamation***, justified the invocation of procedural safeguards." *Id.* at 708-9. (emphasis added). Thus, the stigma referred to in *Paul* is one which requires that one's reputation be defamed.

1. <u>The Act Does Not Impose Any Stigma</u>

The publication of truthful information regarding the fact of a defendant's conviction for his sexual offense does not result in a stigma. Milks has not asserted that any of the information listed as to him on FDLE's website is erroneous. He has not contested the listing of his qualifying offense (lewd/lascivious molestation, a first-degree felony violation of §800.04(5)(B), Fla. Stat.), the information regarding the minor victim, his current status with the Department of Corrections, or the current physical identifying information.

In *Espindola*, the Third District concluded that the "stigma" requirement was met because the publication of information regarding an individual's prior convictions for enumerated sexual offenses conveys the message that the person is dangerous. According to the court in *Espindola*, this implied message that the person is dangerous is perceived as impugning the individual's reputation.[3] The opinion in *Espindola* ignores the context of *Paul v. Davis*. Under *Paul*, the constitutionally protected reputation interest arises only in the context of ***defamatory*** statements regarding that interest. Thus, the stigma must stem from statements as to one's reputation that are **false**. A reputation is not stigmatized if the publications regarding the reputation are not false. *See Codd v. Velger*, 429 U.S. 624 (1977) (rejecting plaintiff's due process claim based upon wrongful dismissal without a hearing, where plaintiff did not allege that basis for dismissal was false). The information

[3] Addressing the question of stigma, the Third District summarily found that "[t]he act of being publicly labeled, pursuant to FSPA, a 'sexual predator' clearly results in a stigma." *Espindola*, 855 So. 2d at 1287. The court cited *Doe v. Pataki*, 3 F. Supp. 2d 456, 467-68 (S.D.N.Y. 1998), quoting that case for the proposition that "'the community notification provisions of the Act will likely result in their being branded as convicted sex offenders who may strike again and who therefore pose a danger to the community. . . . [S]uch widespread dissemination of the above information is likely to carry with it shame, humiliation, ostracism . . . .'" 855 So. 2d at 1287.

published under the Act is truthful information -- the individual's name, other identifying factors, and the prior convictions. The truthful publication of an individual's conviction of a crime does not state a claim for defamation. Restatement (Second) of Torts, § 581A, comment c (1977) (when a statement is "a specific allegation of the commission of a particular crime, the statement is true if the plaintiff did commit that crime."); *Barnett v. Denver Publishing Co., Inc*., 36 P.3d 145, 147-48 (Colo. App. 2001), *rev. denied*, 2001 Colo. LEXIS 1015 (Colo. Dec. 17, 2001), *cert. denied*, 535 U.S. 1056 (2002). Thus, because there has been no defamatory publication, there is no stigma.

Further, the information made available under the Act does not impose any stigma since it consists of truthful information which is already public. Information regarding convictions for sexual offenses is already available in either court files in the Clerk's Office or in the public records of the county's Official Records Books. Facilitating access to already public information is neither defamatory nor stigmatizing. Such facilitation via the Internet simply provides Florida's citizens an effective means to review information relevant to their public safety.

Based upon this reasoning, the Washington Supreme Court has

concluded that publication of information regarding a sex offender's prior convictions did not result in any stigma. *In re Meyer*, 16 P.3d 563 (Wash. 2001). A federal district court in Michigan came to the same conclusion, rejecting the proposition that a stigma ensued from publishing information in a registry on the Internet regarding sex offenders' prior convictions:

> The Court rejects the Doe and Roe plaintiffs' attempt to establish a transgression of a protected liberty interest. While the plaintiffs' claim that widespread dissemination of information concerning their conviction of a sex offense will result in a loss of liberty, ***plaintiffs ignore the inescapable fact that such information is already a matter of public record***. The Court fails to discern how plaintiffs can claim deprivation of a liberty interest resulting from dissemination of information already the subject of public record.

Akella v. Michigan Dep't of State Police, 67 F. Supp. 2d 716, 728-29 (E.D.Mich. 1999) (emphasis added). Many other courts have similarly found no constitutional interest in reputation where the information made available to the public consisted solely of truthful information regarding the offender's criminal history. *See, e.g., Patterson v. State*, 985 P.2d 1007, 1017 (Alaska Ct. App. 1999); *People v. Logan*, 705 N.E. 2d 152, 160-61 (Ill. Ct. App. 1998); *In the Matter of Wentworth*, 651 N.W. 2d 773, 778 (Mich. App. 2002); *Lanni v. Engler*, 994 F. Supp. 849,

855 (E.D. Mich. 1998); *Doe v. Kelley*, 961 F. Supp. 1105, 1112 (W.D. Mich. 1997); *Illinois v. J.R. (In re J.R.)*, 793 N.E. 2d 687, 699-700 (Ill. App. 2003).

The Supreme Court recently concurred with the foregoing analysis as applied to the Alaska Sex Offender Registration Act. *Smith v. Doe*, 538 U.S. 84 (2003). As part of the analysis of whether the Alaska statute was "punitive" for purposes of ex post facto analysis, the Court rejected the notion that the "shaming" of a person constitutes punishment. The Court's reasoning is directly applicable to the question of whether any stigma exists or whether stigma flows from the publication of truthful information:

> . . . Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community. . . . By contrast, ***the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.***

538 U. S. at 98 (emphasis added). Similarly, the Court observed that the process of making the information available to the

public on an Internet website was "more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Id.* at 99. To whatever extent there was stigma, it derived from the convicted offender's own conduct. The consequences flow from the fact of conviction.

Although the foregoing points were made by the Court in the context of evaluating whether the Act's requirements were punitive, the Court's analysis is equally applicable in the context of consideration of whether a protected interest exists in one's reputation. A convicted sex offender cannot satisfy the requirements of the stigma-plus test of *Paul v. Davis*. *Smith v. Doe* establishes that there is no stigma from the dissemination to the public of truthful information regarding a sex offender's conviction. Moreover, there is nothing inherently defamatory in the dissemination of such information already readily available in other public records. Thus, any "stigma" that exists stems from the already public fact of a prior conviction.

The *Espindola* opinion attempted to circumvent the reasoning of *Smith v. Doe* by stating that Florida's Act goes further than the Alaska Act by, in addition to making the information available to the public on the Internet, directing the local

sheriff or chief of police to "notify members of the community and the public "as deemed appropriate by local law enforcement personnel and the department." *Espindola*, 855 So. 2d at 1288; § 775.21(7)(b), Fla. Stat. That direction, however, is a distinction without legal significance. First, since any stigma flows from the fact of the underlying conviction itself, it is immaterial whether a member of the public learns of the information through the website or through notice provided by the local law enforcement office. Second, although the procedure may increase the number of people who actually see the information, the existence of any "stigma" does not depend on the number of people who actually see or have access to the information. Finally, the statutory provision is <u>not</u> mandatory, as it gives local law enforcement officers discretion to determine the appropriate manner in which they should act. Indeed, there is no claim herein that local law enforcement authorities did anything beyond what was already made available on FDLE's website. In *Espindola*, the Third District found that the sexual predator designation implies the individual is dangerous, and that this implication alone supports the conclusion that the defendant is defamed, and hence constitutionally stigmatized. However, as the relevant case law establishes, an implication, without more, is generally

insufficient to support a claim for defamation. *See, e.g., White v. Fraternal Order of Police*, 909 F. 2d 512, 520 (D.C. Cir. 1990) ("If a communication, viewed in its entire context merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established."); *see also* W. Page Keeton, Prosser & Keeton on the Law of Torts § 116, at 117 (5th ed. Supp. 1988) (same).

Finally, for those individuals who are designated sexual predators as a result of having two or more convictions for enumerated offenses, there could not possibly be any "defamatory stigmatization" from making such information available on the internet. Such individuals, by virtue of repeat offenses, have already demonstrated their dangerousness through their own recidivism. Thus, for repeat offenders the dangerousness is demonstrated by the recidivism which has already occurred. Since no defamatory stigmatization could exist, the first prong of the stigma-plus test would not be established, and there would be no entitlement to any form of procedural due process prior to making such public records information available over the internet.

2. <u>There Are No Plus Factors</u>

After finding "stigma" in *Espindola*, the Third District found that one or more "plus factors" existed under the *Paul v.*

Davis "stigma-plus" test. After enumerating the "plus factors" asserted by Espindola -- registration requirements, employment prohibitions, and inability to pursue tort remedies, the court simply "agrees" that those are qualifying "plus factors," merely citing *Paul* and *Collie v. State*, 710 So. 2d 1000, 1012 (Fla. 2d DCA 1998), for the proposition that employment restrictions are a "plus factor." *Espindola*, 855 So. 2d at 1288. In support of its conclusion the *Espindola* court also cited opinions from Hawaii, Oregon and Massachusetts. *Id.* at 1288-89, nn.19, 20, 21.[4]

However, *Paul v. Davis* requires that there be a causal connection between the defamatory stigma and the consequential plus factor. *Paul v. Davis* made this point through its discussion of *Wisconsin v. Constantineau*, *supra*. In *Constantineau*, a state statute authorized "posting," which consisted of forbidding the sale or delivery of alcoholic beverages to those who had been determined to become hazards to

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[4] These opinions refer to other possible plus factors as well - e.g., effect on association with neighbors, choice of housing, vigilantism, verbal and physical harassment. In *Espindola*, the defendant did not raise these as qualifying plus factors in either the trial court or the district court of appeal. Espindola argued only that the registration requirements, employment restrictions, and limitations on tort remedies were qualifying plus factors. The *Espindola* opinion never states that it is finding any of the other factors noted in out-of-state opinions in the instant case or that they are valid plus factors under the stigma-plus test.

themselves or others, by reason of their "excessive drinking." The "plus factor" in *Constantineau*, as explained by the Court in *Paul*, was the limitation of the individual's prior right to purchase liquor as a result of being labeled a problem drinker. 424 U.S. at 708-09. This plus factor was caused by defamatory and stigmatizing posting of the individual as being one who drinks excessively and who constitutes a hazard. Thus, as *Paul* noted, in such cases as *Constantineau*, "a right or status previously recognized by state law was distinctly altered or extinguished," ***"as a result of the state action complained of."*** 424 U.S. at 711 (emphasis added). Thus, the *Paul* Court viewed the plus factor in *Constantineau* as being based on "the fact that the governmental action taken in that case deprived the individual of a right previously held under state law." 424 U.S. at 708. In recognition of the causal link requirement established by *Paul*, the Eleventh Circuit Court of Appeals has construed *Paul* to hold "that in order to be actionable, ***the stigmatizing statement had to deprive the person of a right held under state law***." *Howe v. Baker*, 796 F.2d 1355, 1360 (11th Cir. 1986) (emphasis added).

Thus, the plus factor must involve the deprivation of an entitlement or an expectation created by state law. The term

"changing legal status" as that term is used in *Paul* refers to the impact of the alleged defamation in *Constantineau*. *Paul*, 424 U.S. at 708. In *Constantineau*, the alleged defamation resulted in the loss of the right to buy alcoholic beverages — a right available to all other citizens except those listed by public officials as problem drinkers. In short, the *Constantineau* plaintiff lost a state-created expectation as a result of an administrative fiat. Since reputation itself is not a protected liberty or property interest, viewing a plus factor as anything but the deprivation of an entitlement could result in requiring a due process hearing when no protected property or liberty interest is affected.

The alleged plus factors herein were not caused by any allegedly defamatory and stigmatizing publication. For example, registration, which exists independently of Internet publication, is not a consequence of a defamatory publication. Rather, registration is a requirement imposed on those who have been convicted of serious and/or multiple sexual offenses. Thus, registration is caused by the individual's own criminal conduct, not any defamatory publication. The same principle holds true as to the other factors. The *Espindola* court erroneously divorced the plus factors from the allegedly defamatory, stigmatizing statement proceeding on the premise

that as long as there is a stigma and a plus factor, even if not causally linked, the stigma-plus test is satisfied.

a. Employment restriction is not a plus factor.

A convicted sexual offender is not barred from certain employment under the Act because of a defamatory and stigmatizing publication. Rather, the convicted offender's employment is restricted as a result of the prior criminal conduct. In *Paul*, the Court recognized the possibility that the police flyer, which identified Davis as an active shoplifter, might impair Davis's employment prospects. 424 U.S. at 697. That, however, was not sufficient to implicate employment as a qualifying plus factor. *Id.* at 712. The subsequent decision of *Siegert v. Gilley*, 500 U.S. 226 (1991), involved an arguably even more direct connection between conduct by the government and an individual's actual employment. Siegert had been employed as a psychologist in a federal government facility. Upon learning that his supervisor was preparing to terminate his employment, Siegert resigned, but sought employment elsewhere within the government. His new position required "credentialing" from his former employer, and the former supervisor, in turn, provided a highly negative evaluation. This resulted in the denial of the required credentials as well as a rejection for the position Siegert had sought. The Court

recognized that the negative evaluation could damage Siegert's reputation and impair his future employment prospects. 500 U.S. at 234. That, however, did not suffice to state a claim for denial of due process. *Id.* at 233-34.

Construing and applying *Paul* and *Siegert* in the context of a claim of defamation against a government actor resulting in a loss of employment by a third party, the First Circuit, in *Aversa v. United States*, 99 F.3d 1200 (1st Cir. 1996), held: "in order to state a cognizable claim that defamation together with loss of employment worked a deprivation of a constitutionally-protected liberty interest, *a plaintiff must allege that the loss of employment resulted from some further action* ***by the defendant*** *in addition to the defamation*." *Id.* at 1216 (emphasis added). The loss of existing or prospective employment by a third party would not, in and of itself, constitute the "plus" factor required under *Paul* to establish a due process violation.[5]

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[5] *See also Kelly v. Borough of Sayreville*, 107 F.3d 1073, 1078 (3d Cir. 1997) ("the possible loss of future employment opportunities is patently insufficient to satisfy the requirement imposed by *Paul* that a liberty interest requires more than mere injury to reputation."); *Cannon v. City of West Palm Beach*, 250 F. 3d 1299, 1303 (11th Cir. 2001) (holding that the stigma-plus test was not satisfied based on allegations of a "missed promotion," as there must be allegations of a "discharge or more."); *Hawkins v. Rhode Island Lottery Commission*, 238 F.3d 112, 115 (1st Cir. 2001) (reiterating holding of *Aversa*); *Sturm v. Clark*, 835 F.2d 1009, 1012-13 (3d

Thus, at an absolute minimum, even when employment consequences can serve as a plus factor, there must be an ***actual*** loss of present employment **with the defendant**. While § 775.21(10)(b) bars employment in designated settings where children congregate, such limitations also exist by virtue of other statutes solely as a result of the conviction for the sexual offense. For example, § 1012.32(2)(a), Fla. Stat. (2003), expressly prohibits the employment in public schools of personnel whose fingerprint checks disclose the existence of convictions of crimes involving moral turpitude. Similarly, § 402.305(2)(a), Fla. Stat., in conjunction with § 435.04, Fla. Stat., prohibits the hiring of personnel for licensed child care facilities if such individuals have convictions enumerated in § 435.04. Convicted sex offenders who receive probationary sentences (or community control), are likewise subject to mandatory conditions of sex offender probation. Section 948.03(5), Fla. Stat. Those conditions include a prohibition against living within 1,000 feet of a school, day care center, park, playground, or other place where children regularly congregate. *Id.* The conditions also prohibit employment in the

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Cir. 1987) (defamation allegedly resulting in lost business and financial harm was insufficient to constitute plus factor under *Paul*).

same places as prohibited by the Sexual Predator Act when the victim was a minor. *Id.* The same conditions also apply to those released from incarceration under the conditional release program. Section 947.1405(7), Fla. Stat. Thus, virtually identical employment prohibitions would exist even if the individual is not designated as a sexual predator under § 775.21. Like the conditions on employment imposed by the Act, these conditions are the products of the ***conviction***, not the designation.

Furthermore, for any claim under the stigma-plus test to be viable in the employment context, it must be based on the limitation of rights to ***governmental*** employment; such claims are not viable with respect to ***private employment***. *Pendleton v. City of Haverhill*, 156 F.3d 57, 63 (1st Cir. 1998). In short, the Act's employment prohibitions do not significantly alter any preexisting entitlement under state law or the Constitution.

b. <u>The registration requirement is not a plus factor</u>.

As noted above, the registration requirements of the Act are not caused by any defamatory and/or stigmatizing conduct of the State. Registration therefore does not qualify as a plus factor. Several courts, addressing procedural due process challenges to state registration acts, have concluded that plus factors were not present in those state statutes. *See Illinois*

v. J.R. (In re J.R.), 793 N.E. 2d 687, 696-98 (Ill. App. 2003); *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003); *see also Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998).

Furthermore, as with the employment factor, the registration requirement does not alter the individual's entitlements under state law or the Constitution. Records of Milks' conviction and sentence, and the nature of the offense exist independently of the registration process, as evidenced by courthouse records, official records of the county, Department of Corrections records, and FDLE records. Additionally, persons residing in Florida must keep the State advised of a current residence in order to obtain drivers licenses or other comparable formal identification, to have children qualify for attendance at local schools, to have employers report withholding of taxes, and to qualify for public insurance benefits. Registration under the Act does not provide the State with any information which it does not otherwise have in its records - records which would exist independent of the Act's registration requirements. With respect to the possibility of having to provide FDLE with "evidentiary genetic markers when available," § 775.21(6)(a)2., Fla. Stat., such a requirement exists by virtue of mandatory

conditions of sex offender probation, § 948.03(5)(a)8, Fla. Stat., and mandatory conditions of conditional release for sex offenders, § 947.1405(7)(a)8., Fla. Stat.

c. Tort immunity is not a plus factor.

The final plus factor which the *Espindola* opinion alludes to is the statutory limit on the right to pursue certain tort remedies. Under the Act, FDLE, DOC, the Department of Highway Safety and Motor Vehicles, and any law enforcement agency in this state, and the personnel of those departments, as well as other specified public employees and agencies, are "immune from civil liability for damages for good faith compliance with the requirements of this section or for the release of information under this section, and shall be presumed to have acted in good faith in compiling, recording, reporting, or releasing the information. . . ." § 775.21(9), Fla. Stat. As with the other alleged plus factors, this immunity is not caused by any defamatory or stigmatizing action by the State. For that reason alone, the immunity does not constitute a viable plus factor. Even if such causation were deemed to exist, the immunity clause does not constitute an alteration in the registrant's legal status under state law or the Constitution. The *Espindola* court mistakenly assumed that an individual in the defendant's position would be able to sue the State, its departments, or its

employees, for an alleged defamation but for the quoted provision of the Act. However, principles of sovereign immunity of the State, and absolute or qualified immunity of its employees, which predate the Act, independently bar such causes of action.

The grant of immunity under the Act does not impair any expectations that a sexual offender may have under tort law. It does not, for instance, bar causes of action based on bad faith. Moreover, with respect to defamation, Florida law provides public officials with absolute immunity as to defamation claims when the officials are acting in connection with their official duties. *Goetz v. Noble*, 652 So. 2d 1203, 1204-05 (Fla. 4th DCA 1995); *Skoblow v. Ameri-Manage, Inc.*, 483 So. 2d 809 (Fla. 3d DCA 1986). Furthermore, general principles of sovereign immunity bar liability of the State for actions done by its employees in bad faith. *Ford v. Rowland*, 562 So. 2d 731, 734 (Fla. 5th DCA 1990). Additionally, with respect to the enforcement of laws and the protection of public safety, there has never been any governmental tort liability regarding discretionary governmental functions. *Department of Health and Rehabilitative Services v. B.J.M.*, 656 So. 2d 906, 911-12 (Fla. 1995); *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985). Making public records information

available to those who seek it through a governmental program appears to involve classic discretionary, non-tortious governmental conduct. *See Trianon*, 468 So. 2d at 918-19. Thus, independent of the immunity clause of § 775.21(9), no tort liability on the part of the State exists, and there is no alteration of anyone's legal status under state law as a result of § 775.21(9). Therefore, the limited liability protections in the Act do not impair legal entitlements or expectations and do not constitute a plus factor.

C. The Act Is Not Facially Unconstitutional

The *Espindola* court appeared to hold that the Act is facially unconstitutional. However, a facial challenge to a statute "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). There are circumstances in which the Act can be validly applied. The *Espindola* opinion, that the sexual predator designation improperly stigmatized someone, even if arguably true in some circumstances, would be demonstrably untrue in others. For instance, the employment restrictions set forth in § 775.21(10)(b), apply to enumerated offenses therein, ***but***, the enumerated offenses do not include ***all*** offenses which would result in an individual being designated a sexual predator. *Compare*, § 775.21(4)(a)1.b. and § 775.21(10)(b),

Florida Statutes.[6] Individuals may also be unemployable in the enumerated occupations for reasons independent of the employment restrictions in § 775.21, thus demonstrating that the Act is not unconstitutional in all of its possible applications. In still other circumstances criminal defendants, as part of their criminal case plea agreements, may acknowledge that they are "dangerous" sex offenders, thereby eliminating any conceivable basis for the defamatory stigma which serves as the linchpin for the Third District's opinion in *Espindola*.

Yet another instance where the Act, at a minimum, might remain constitutional absent a hearing to determine dangerousness is in the context of those individuals who are designated sexual predators under the Act as a result of having at least two convictions, thereby demonstrating their actual recidivism.

D. Severability

Even if this Court concludes that the Act is facially unconstitutional, the Court should consider whether the problematic provisions are severable. As set forth in *Cramp v. Board of Public Instruction of Orange County*, 137 So. 2d 828,

[6] Subsection (4)(a)1.b includes enumerated qualifying offenses of §§ 825.1025 and 847.0135, neither of which qualify for the employment restrictions which are a fundamental part of the panel's analysis.

830 (Fla. 1962):

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

As suggested by Judge Cope in *Espindola*, to the extent this Court believes the term "predator" causes a stigma, this term can be excised while leaving the remainder of the Act intact. *Espindola*, 855 So. 2d at 1292. (Cope, J., concurring and dissenting).

Further, to the extent the Court deems the employment restrictions or tort immunity problematic, these provisions could be severed. The Act existed for several years prior to the addition of the employment restrictions in 1996. *See* ch. 96-388, s. 61, Laws of Florida. The legislative purposes set forth in the preliminary portions of the Act[7] make clear the

[7] *See* § 775.21(3), Fla. Stat., emphasizing the threat of sexual predators to the public safety, and the justification, based on that threat, for public policies including incarceration, supervision, registration, notification, and employment restrictions.

Legislature intended the registration and notification requirements to remain in effect independent of the employment restrictions. This conclusion is corroborated by the fact that other independent statutory provisions effectively limit the ability of convicted sex offenders to obtain employment in settings where children congregate. Likewise, it would be possible to sever the tort liability limitation since this provision appears to have little, if any, practical effect, as comparable limitations are otherwise in effect as discussed in Section I.B.2.c. of this brief.

II. UNPRESERVED CONSTITUTIONAL CLAIMS

Substantive Due Process / Privacy / Equal Protection

Petitioner's current *substantive* due process claim was not raised in the trial court or the Second District Court. In fact, the trial court specifically noted that he was "not being called upon to pass upon the substantive nature" of the Sexual Predator Act. (R81-82) On direct appeal, the Second District Court also found that petitioner "has not raised" a substantive due process claim. *Milks*, 848 So. 2d at 1169.

In *Doe*, although the defendant's arguments were couched in terms of procedural due process, the Supreme Court found that such analysis was irrelevant where the state statute did not hinge on any current factual issues:

> In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of ***all*** sex offenders - currently dangerous or not - must be publicly disclosed. ***Unless respondent can show that the substantive rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise***.
>
> *Doe*, 123 S.Ct. 1160, at 1164

Any challenge to the statute must be viewed solely as a question of the validity of the right of the State to draw such a classification. If the legislative classification is valid, as a matter of substantive due process, then the statute is constitutionally valid without any entitlement to a procedural due process hearing. Just as the United States Supreme Court declined to address any substantive due process claim in ***Doe*** because it was not properly before it, any alleged substantive due process challenge has not been fairly presented to the trial court and district court in this case. Claims regarding the validity of state statutes in terms of substantive due process are more appropriately addressed by trial courts as courts of first impression.

Moreover, in addressing substantive due process challenges, this Court has stated that "[t]he test for determining whether a statute . . . violates substantive due process is whether it

bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary, or oppressive." *Ilkanic v. City of Fort Lauderdale*, 705 So.2 d 1371, 1372 (Fla. 1998). Questions of substantive due process are inextricably intertwined with an element of factual development, and that is a matter best left for a trial court, as a matter of first impression. "Constitutional cases argued in terms of due process typically involve reliance upon legislative facts for their proper resolution." See, *McCormick on Evidence* (5th ed.), § 331.

In *Trushin v. State*, 425 So. 2d 1128 (Fla. 1983), this Court held that although the facial validity of a statute may be asserted for the first time on appeal, the "constitutional application of a statute to a particular set of facts . . . must be raised at the trial level." *See also*, *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) (for an issue to be cognizable on appeal it must be the specific contention asserted below as the ground for objection). Assuming, *arguendo*, that the petitioner's substantive due process argument may be addressed for the first time in this Court,[8] petitioner's claim still must

[8]However, as reiterated by this Court in *Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002) n. 16, to the extent that a defendant's due process claims turn on factual disputes, such claims should have been presented to the trial court and will not be addressed for the first time on review by this Court.

fail for the following reasons.

Essentially, petitioner contends that the statute violates substantive due process because the nature of his privacy interests allegedly outweighs the State's interest in the legislation and the State has not narrowly drawn the statute to further its interests. In assessing the constitutionality of a statute, this Court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." *State v. Stalder*, 630 So. 2d 1072, 1076 (Fla. 1994)(quoting *State v. Elder*, 382 So. 2d 687, 690 (Fla. 1980). The critical inquiry in a substantive due process analysis is whether the legislation bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary, or oppressive. See, *Ilkanic v. City of Fort Lauderdale*, 705 So. 2d 1371 (Fla. 1998). The legislative intent expressed in the Sexual Predator Act is quite compelling:

> Repeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Sexual offenders are extremely likely to use physical violence and to repeat their offenses, and most sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction

> of their crimes. This makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant.

§ 775.21(3)(a), Fla. Stat. As the statute further notes, the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the State with sufficient justification to implement the requirements of the Sexual Predators Act. §775.21(3)(b), Fla. Stat. Indeed, the petitioner commends the legislature's desire to protect the public as "certainly laudable." (Brief of Petitioner on the Merits at 21). Concerns about sexual offenders who prey on children and recidivism for sex offenders are valid legislative concerns. *See*, *McKune v. Lile*, 122 S.Ct. 2017, 2024 (2002) ("when convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."); *See also*, *Illinois v. J.R.* (*In re J.R.*), 793 N.E. 2d 687 (Ill. App. 2003) (rejecting substantive due process challenges to similar act).

As a practical matter, the information to be distributed under the Act is all a matter of public record, therefore, a defendant can have no reasonable expectation of privacy in it. See, § 119.01, Fla. Stat. For example, the same information may be obtained from other existing public records, including the

court files, the arrest report, and various license and registration records. The dissemination of the identical public information *via* the FDLE website does not violate any constitutionally protected interest. In *Reyes*, the Fourth District rejected the defendant's similar substantive due process "privacy" challenge, and set forth the following cogent rationale,

> . . . Whether a statute violates the right to privacy requires evaluation under a compelling state interest standard. *Bd. of County Comm'rs of Palm Beach Cty. v. D.B.,* 784 So. 2d 585 (Fla. 4th DCA 2001). In *Doe v. Poritz,* 142 N.J. 1, 662 A.2d 367, 407 (1995), the Supreme Court of New Jersey held that its version of the Act did not violate an offender's right to privacy because the information disclosed was public information.
>
> Even assuming, however, that the information disclosed pursuant to the Act is private under the federal or Florida constitutions, the stated and patent public purpose of the Act is a sufficiently compelling state interest justifying such an intrusion on privacy. *See Jackson v. State,* 833 So.2d 243 (Fla. 4th DCA 2002). Here, the legislature has expressly articulated the purpose of the Act in section 775.21(3), recognizing:
>
> (a) Repeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Sexual offenders are extremely likely to use physical violence and to repeat their offenses, and most sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. This makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant.
> (b) The high level of threat that a sexual predator

> presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:
>
> * * *
>
> 3. Requiring the registration of sexual predators, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public.
>
> 4. Providing for community and public notification concerning the presence of sexual predators.
>
> 5. Prohibiting sexual predators from working with children, either for compensation or as a volunteer.
>
> (c) The state has a compelling interest in protecting the public from sexual predators and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual predators to register and for requiring community and public notification of the presence of sexual predators.
>
> Here, as the state has a compelling interest in notifying the public of the release of sexual predators into their community, we conclude that the Act does not violate the offender's right to privacy.
>
> *Reyes*, 854 So. 2d at 817

See also, *Johnson v. State*, 795 So. 2d 82 (Fla. 5th DCA 2000)(holding that the sexual offender registration and notification statutes did not violate Johnson's right to privacy).

Petitioner concedes that his equal protection claim was not presented below. (See, Brief of Petitioner on the Merits, fn. 16, at 37). Petitioner's equal protection/irrebuttable

presumption claim is not only procedurally barred, but also without merit. The Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of laws,' which is essentially a direction that all persons similarly situated should be treated alike." ***Raines v. State***, 805 So. 2d 999, 1002 (Fla. 4th DCA 2001), citing ***City of Cleburne v. Cleburne Living Ctr.,*** 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). "The general rule [for equal protection] is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." ***Id.*** at 440, 105 S.Ct. 3249." ***Raines***, 805 So. 2d at 1002. Furthermore, as this Court noted in ***Westerheide***, "the equal protection clause is only concerned with whether the classification pursuant to a particular legislative enactment is properly drawn. Procedural due process is the constitutional guarantee involved with a determination of whether a specific individual is placed within a classification." ***Id***. at 111, citations omitted.

In support of his unpreserved equal protection claim, the petitioner relies, in part, on ***Robinson v. State***, 804 So. 2d 451 (Fla. 4th DCA 2001) and ***Raines***. However, neither ***Robinson*** nor ***Raines*** credibly benefit this petitioner. In ***Robinson***, the Court held that the Sexual Predators Act was unconstitutionally

overinclusive *as applied to Robinson*, because it proscribed offenses that were not sexual in nature. In *Raines*, the Court found that the sexual offender registration statute violated equal protection, *as applied*, in classifying Raines as a "sexual offender," when he was not convicted of an offense involving any sexual component. However, as recognized in *Raines*, "[w]ithout question, the state has an interest in protecting the public from sexual offenders." Ch. 2000-246, § 3 Laws of Fla. *Id.* at 1002.

In this case, the petitioner does not, and cannot, dispute that he fairly qualifies for designation as a sexual predator based on his conviction for the lewd/lascivious molestation of a child less than 12 years of age. The designation of a person as a sexual offender is rationally related to that goal where an accused, like this petitioner, has been convicted of lewd/lascivious molestation of a minor child. Moreover, contrary to the petitioner's current arguments, the irrebuttable presumption doctrine is of limited application in light of *Weinberger v. Salfi*, 422 U.S. 749,777 (1975). *See, Black v. Snow*, 272 F. Supp.2d 21 (D.C. Dist. Ct. 2003). This Court also has applied *Salfi* to defeat arguments similar to the unpreserved claim now advanced by the petitioner. See, *Gallie v. Wainwright*, 362 So. 2d 936, 943-944 (Fla. 1978)(relying on *Salfi* and finding

nothing irrational in legislative judgment that the likelihood of further criminal activity or flight from prosecution in the case of repeat offenders whose civil rights have not been restored is sufficiently great that the public interest could be effectively protected only by absolute prohibition against their release after conviction).

Separation of Powers

Lastly, Milks renews his separation of powers argument, asserting that Article II, section 3 of the Florida Constitution is violated because it makes the sexual predator designation mandatory for all defendants who meet the statutory criteria. Petitioner's separation of powers claim, although admittedly preserved for review, has been rejected by the Second, Fourth, and Fifth District Courts of Appeal. *See*, *Milks*, 848 So. 2d at 1169; *Kelly v. State*, 795 So. 2d 135, 137 (Fla. 5th DCA 2001); *Reyes*, 854 So. 2d at 819.

In rejecting the separation of powers claim, both the Second District and the Fourth District relied primarily upon *Kelly*, in which the Fifth District set forth a comprehensive analysis of this claim. As noted in *Kelly*, "the Legislature found that "[t]he state has a compelling interest in protecting the public from sexual predators and in protecting children from predatory sexual activity," " § 775.21(3)(c), Florida Statutes (2000), and

that "in order to protect the public, it is necessary that the sexual predator be registered with the department and that members of the community and the public be notified of the sexual predator's presence." § 775.21(3)(d), Fla. Stat. *Id.* "Given the fact that the sexual predator designation is part of a substantive statutory enactment designed and intended to accomplish these policy objectives, the courts have recognized that the designation is neither a sentence nor a punishment." *Kelly*, 795 So. 2d at 138.

In rejecting the defendant's separation of powers claim in *Kelly,* the Court stated, in pertinent part:

> In order to enforce and apply the provisions of the Act, the trial court must render written findings based on statutory criteria to determine whether a person being sentenced for a designated criminal offense qualifies as a sexual predator. Thus this judicial function requires the trial court to uphold the declared public policy of the Legislature by acting as a fact-finder to determine whether the statutory criteria exist to designate an individual as a sexual predator and render a written order to that effect. This is a typical function of courts and does not constitute a violation of the separation of powers clause.
>
> Even if the Act could be considered a sentence enhancement which removes discretion from the trial judge, the Act does not violate the separation of powers clause. The courts generally agree that although sentencing in criminal cases is the obligation of the court, Forbes v. Singletary, 684 So.2d 173 (Fla.1996), a statute that requires imposition of a mandatory sentence does not violate

the separation of powers clause. State v. Cotton, 769 So.2d 345 (Fla.2000); O'Donnell v. State, 326 So.2d 4 (Fla.1975); Owens v. State, 316 So.2d 537 (Fla.1975); see also Chapman v. United States, 500 U.S. 453, 467, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (holding that the Legislature can define criminal punishment "without giving the courts any sentencing discretion.").

Moreover, the courts have consistently held "that where a sentence is one that has been established by the legislature and is not on its face cruel and unusual, it will be sustained when attacked on grounds of due process, equal protection, or separation of power theories." Sowell v. State, 342 So.2d 969, 969 (Fla.1977) (citing O'Donnell; Owens; Owens v. State, 300 So.2d 70 (Fla. 1st DCA 1974), appeal dismissed, 305 So.2d 203 (Fla.1974); Dorminey v. State, 314 So. 2d 134 (Fla.1975)); see also Lightbourne v. State, 438 So. 2d 380, 385 (Fla.1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); Scott v. State, 369 So. 2d 330, 332 (Fla. 1979). We do not find the designation pursuant to the statute cruel or unusual, even if it could be considered a form of punishment.

Thus it is well-settled that the Legislature has the exclusive power to determine penalties for crimes and may limit or eliminate sentencing options or provide for mandatory sentencing. See Wilson v. State, 225 So.2d 321, 323 (Fla. 1969), reversed on other grounds, 403 U.S. 947, 91 S.Ct. 2286, 29 L.Ed.2d 858 (1971); see also State v. Coban, 520 So.2d 40, 41 (Fla. 1988); Dorminey v. State, 314 So.2d 134, 136 (Fla. 1975). In Gray v. State, 742 So.2d 805, 806-07 (Fla. 5th DCA 1999), rev. denied, No. SC96765, 791 So.2d 1097 (Fla. Jun. 21, 2001), this court stated the general rule as follows:

We agree that the trial court has no discretion once the state files a notice of enhancement. However, we do not agree that the statute violates the separation of powers doctrine. Moreover, the legislature has not usurped the sentencing duties of

> the court by enacting this legislation. We see no difference between this statute and others that require the court to enter a specific sentence or to enhance a sentence if certain criteria are met. It is within the province of the legislature to determine the penalties for crimes, as long as the penalties are not cruel and unusual. Lightbourne v. State, 438 So.2d 380 (Fla. 1983) (citing Sowell v. State, 342 So.2d 969 (Fla. 1977)). Further, "[o]ur supreme court has said that a statute which requires the imposition of a mandatory minimum sentence if certain conditions are met does not violate the separation of powers clause by virtue of the fact that it removes sentencing discretion from the judiciary." Woods v. State, 740 So.2d 20 (Fla. 1st DCA 1999) (citing Scott v. State, 369 So.2d 330 (Fla. 1979)). We agree with the reasoning of our sister court, the Third District, which addressed the same issue in McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA 1999), and affirm. (Footnote omitted)
>
> **Conclusion**
>
> We conclude that the Act is mandatory and requires the courts to find, based on statutory criteria, whether record evidence exists to find that an individual charged with a specific crime qualifies for designation as a sexual predator. This is a typical judicial function that upholds the declared public policy of this state enunciated by the Legislature through the various provisions of the Act. Mandatory application of the Act by the courts does not offend the separation of powers provisions of our constitution.
>
> *Kelly*, 795 So. 2d 137-139.

If the legislature can permissibly set minimum and maximum punishments, can set mandatory sentences, and, as in the Prison Releasee Reoffender Punishment Act, remove virtually all sentencing "discretion" from the judiciary and place it in the hands of the executive branch, *State v. Cotton*, 769 So. 2d 345, 347-350 (Fla. 2000), it can certainly make the sexual predator

designation applicable upon a showing of certain qualifying events.

The concerns raised in Judge Padovano's concurrance in ***State v. Curtin***, 764 So. 2d 645, at 647-48 (Fla. 1st DCA 2000) appear to derive from a conclusion that a statute which leaves no residual discretion to the judiciary ***ipso facto*** violates the separation of powers doctrine. However, §775.21 has been repeatedly held ***not*** to be a sentencing statute and, therefore, no judicial sentencing discretion has been removed. Sexual predator designation is a status, akin to being declared a habitual offender, and the legislature may make such declarations a ministerial act. Moreover, as noted in ***Cotton***, the fact that earlier cases had found the habitual offender statute not violative of separation of powers because sentencing discretion was partially retained did not mean that "the inverse" of that proposition was true, ***i.e.***, that if no discretion is retained, separation of powers has been violated. ***Id.*** at 349-50. Finally, the Court in ***Reyes***, quoting this Court in ***Sebring Airport Authority v. McIntyre***, 783 So. 2d 238, 244-45 (Fla. 2001), recognized that the separation of powers clause itself precludes judicial review of legislative policy that does not violate constitutional principles:

> Where a statute does not violate the federal or

> state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.
>
> *Reyes, 854 So. 2d at 819, citing Sebring Airport Authority*, 783 So. 2d at 244-45

The separation of powers doctrine is not violated when the legislature creates a status, defines those who are accorded that status, and declares that, pursuant to public policy,[9] all individuals meeting the qualifying criteria are to be designated as having that status. In light of the foregoing arguments and authorities, the State respectfully urges this Court to approve the decision of the Second District Court in the instant case, *Milks v. State*, 848 So. 2d 1167 (Fla. 2003).

[9] The policy establishes a compelling state interest. *Jackson v. State*, 795 So. 2d 82, 88 (Fla. 5th DCA 2001).

CONCLUSION

Based on the foregoing, this Court should uphold the constitutionality of Florida's Sexual Predators Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits has been furnished by U.S. mail to Anthony C. Musto, Assistant Public Defender, P. O. Box 9000 - Drawer PD, Bartow, Florida 33831, this 12th day of February, 2004.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this pleading is 12-point Courier New, in compliance with Fla. R. App.P. 9.100(*l*).

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COUNSEL FOR RESPONDENT